

No. 3018

IN THE 3

United States Circuit Court of Appeals

For the Ninth Circuit

COMPAGNIE MARITIME FRANCAISE (a French corporation),

Appellant,

vs.

HERMANN L. E. MEYER, GEORGE H. C. MEYER,
HERMANN L. E. MEYER, JR., J. W. WILSON, and
JOHN M. QUAILE, partners under the style of
MEYER, WILSON & COMPANY,

Appellees.

BRIEF FOR APPELLEES.

EDWARD J. McCUTCHEN,
IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
Proctors for Appellees.

Filed this.....day of October, 1917.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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I.

Statement of the Case.

The French bark "Duc d'Aumale", a steel vessel of 1944 tons register, under charter to Meyer, Wilson & Company, after drydocking and survey at Rotterdam loaded a cargo of 2015 tons of coke and 660 tons of pig iron at Rotterdam to be carried on a voyage around Cape Horn to San Francisco.

She left Rotterdam on September 19, 1907, and towed to Brest, France, where she arrived on September 22d,

and from whence she set sail upon her voyage on September 24th. Thereafter, on the afternoon of September 29th, five days after she left Brest and after she had passed through ordinary squally weather of short duration, 22 centimeters of water were found in the hold, and water thereafter continued to come in at a rate of one centimeter every hour, necessitating pumping regularly 20 minutes each morning and evening.

The vessel continued southward on her voyage toward Cape Horn until, on November 22d, when in latitude $49^{\circ} 37'$ south and in longitude $66^{\circ} 21'$ west, the wind increased in velocity and a high sea was encountered, causing the ship to roll heavily, with the result that the leakage increased but could not be pumped out because the bottom of the pipe at every rolling of the vessel was dry. At 4 o'clock in the afternoon, the wind shifted to the southwest, and thereupon the master wore ship at 8 p. m. Again, on the afternoon of the 24th, the sea continuing, he wore ship, and during this maneuver, when the ship was in an upright position, the carpenter sounded and found one meter and twenty-five centimeters of water in the hold, showing that the water had increased rapidly since morning. Thereupon, the master set one watch to the pumps and, at six o'clock, found one meter and sixty-five centimeters of water in the hold. After consultation with the crew, he resolved to take refuge in the Falkland Islands and so kept the ship off and made for the islands. After she was put before the wind the leakage decreased. She reached Roy Cove late in the afternoon of Novem-

ber 25th and was immediately beached, filling with water until she had 14 feet in her hold.

Thereafter, on February 13, 1908, she was released from her stranding and taken to Port Stanley, leaving there on April 5, 1908, for Montevideo, where she arrived on April 17th. She left Montevideo on May 2d and arrived at Buenos Ayres on May 3d, and was dry-docked and underwent repairs from May 5th to July 18th. As part of the repairs, between two and three hundred loose rivets in her bottom were tightened, and butt seams between the ends of the plating were calked and cemented. The cargo was restowed by distributing the weights of the pig iron more evenly over the bottom of the lower hold instead of leaving it in one block, as originally stowed.

On July 18, 1908, the Duc d'Aumale sailed on her voyage for San Francisco by way of Cape of Good Hope, taking the longer route for the purpose of earning bounty.

She arrived in San Francisco on November 19, 1908, with her cargo of coke and pig iron badly damaged, to the loss of Meyer, Wilson & Company in the amount awarded by the District Court. Thereafter suit was instituted by the owner of the vessel against Meyer, Wilson & Company for freight, and by the latter against the vessel for damages to cargo. The cause was tried in January, 1912, before Judge R. S. Bean, sitting in Division No. 1 of the United States District Court for the Northern District of California. Judge Bean subsequently rendered his decision holding that the "Duc d'Aumale" was unseaworthy at the commence-

ment of the voyage either because of a defective hull or the improper stowage of her cargo, or both, and directed a decree in favor of Meyer, Wilson & Company. After proof of damages had been made on a reference before Commissioner Krull, a final decree was entered by Judge M. T. Dooling on February 8, 1917, in favor of Meyer, Wilson & Company in the sum of \$2,242.72, together with interest thereon from the date of the decree until paid, and for costs in the sum of \$302.50, said former sum being the excess of the damages to cargo over the freight due thereon. Thereafter this appeal was taken by the owner.

II.

Argument.

THE CAUSE OF THE LOSS WAS THE UNSEAWORTHINESS OF THE "DUC D'AUMALE" IN HER HULL AND IN THE STOWAGE OF HER CARGO.

This is a simple case of injury to cargo resulting from unseaworthiness in the hull of the carrying vessel, due to defects in hull either existing at the commencement of the voyage or developing on the voyage through an improper stowage of the cargo.

The salient facts are that the "Duc d'Aumale" developed a leak in the fairest of sailing weather within five days after leaving port, and thereafter, upon encountering the heavier weather reasonably to be expected in the lower latitudes in the vicinity of Cape Horn, which necessarily caused the vessel to work more in her structure by rolling and pitching in the seas, the

leakage so increased that the master, after consultation with his crew, put his vessel before the wind and sea, whereupon she worked less and the leakage decreased; and finally beached her in Roy Cove, Falkland Islands.

The "Duc d'Aumale" Began to Leak in Moderate Weather Shortly After Commencing Her Voyage Without Encountering Sufficient Cause Therefor.

So clearly does the testimony of the master show that the "Duc d'Aumale" sprung a leak in ordinary weather within five days after she left Brest that we quote it for its description of the conditions under which the unseaworthiness of the "Duc d'Aumale" first developed:

On direct examination, he said:

"MR. HENGSTLER. Q. On what date did the vessel leave Rotterdam?

A. 17th of September, 1907. She was cleared on the 17th, and left Rotterdam on the 19th.

Q. What was the first port at which she stopped?

A. Brest.

Q. Where is Brest? A. In France.

Q. And how long did she remain there, and on what days?

A. She arrived on the 22d at 3 P. M., and left on the 24th at 9 A. M. in the morning.

Q. Now, Captain, will you describe the first parts of the voyage, referring to your log, day after day, with reference to the weather which you encountered?

A. We left Brest on the 21st at 9 o'clock in the morning. There was a small breeze from the north, shifting from the north to west, and we sailed until the 26th of September, and *had fine weather and calm sea*. We encountered westerly winds with a choppy sea.

Q. On what day?

A. The 26th of September. There was a swell until the 28th.

Q. What occurred on the 28th?

A. The wind hauled to the southwest, freshening and increased, the sea coming heavy rapidly. The wind shifted to the northwest on the 28th at 2 o'clock in the morning. The weather cleared up, but the sea became very heavy. We had very violent squalls, especially during the watch from 8 o'clock in the morning until noon. The weather became cloudy again in the afternoon with squalls, the sea being very heavy, direction west, northwest. From 8 P. M. to midnight, the sea was still heavier, and the squalls more and more violent.

Q. Are you still on the 28th?

A. Yes, sir; on the 29th the weather became fine, and the squalls less and less violent, the wind decreasing rapidly, there being still a squall. There were times when the ship was rolling heavily, the sea coming from abeam. *At 4 o'clock in the afternoon, we found the increase of water in the ship's hold. We found 23 centimeters at four o'clock.* We pumped at once, and cleared the water from the hold in a quarter of an hour.

Q. What latitude and longitude was the vessel in on that day, the 29th?

A. 38 degrees, 28 minutes north latitude at noon; 17 degrees, 43 minutes west. The vessel was steering south 35 degrees west.

Q. Now, go ahead and tell what happened next.

A. We saw every day that water was increasing in the hold regularly, about one centimeter every hour.

Q. What did you do with the pumps during that time?

A. *We pumped regularly, morning and evening.* At 7:20 in the morning and 4:20 at night.

Q. For how long a time each time?

A. *About twenty minutes each time.*

Q. Did you succeed in controlling the inflow of the water by this pumping?

A. *By pumping forty minutes, we cleared the water from the hold.*

Q. How long did that go on?

A. Nothing happened particularly until the 22d of November." (Ap. 163-165.)

* * * * *

On cross-examination its master testified and the log book showed the following:

"Q. On what day did you leave Brest?

A. 24th of September.

Q. The weather from the time you left Brest up to the 28th day of September, when the leak was sprung, was as fine weather as it was possible to have at sea, was it not?

A. The two or three first days. After that we had a breeze starting at the west, going to south-west, getting fresh, and shifting to the north-west.

Q. But you had no stormy weather up to that time—up to the 28th?

A. I have not examined the log.

Q. Look at your log, and tell us whether the weather was not the ordinary weather that a sailing vessel encounters without any stormy weather?

A. During the nights of the 26th and 27th we had bad weather.

Q. Describe the weather as it is given in the log.

A. From 8 o'clock to midnight of the 26th we had bad weather.

Q. Is this entry in your log correct: 'From midnight of the 26th to midnight of the 27th, weather squally; nice breeze; swell, *all sails set.*' In the second watch, 'Squally weather, nice breeze; *all sails set.*' In the third watch, 'Squally weather; nice breeze; *all sails set.*' In the fourth watch, 'Squally weather of little strength; a fine breeze; *all sails set.*' In the next watch, 'Squally weather; nice breeze; *all sails set.*' Next watch, 'Cloudy; fine breeze; a few squalls; *all sails set.*' The next day; 'From midnight of the 27th to the midnight

of the 28th.' In the first watch, 'Squally weather; strong rain; the wind blows to the southwest, and shifts to the northwest; *gaff topsail and main-jib torn, royals and upper top-gallant sails and staysails and spanker taken in.*' In the next watch, 'The same kind of weather; strong breeze; a large swell from the northwest; the top-gallant sails taken in; *unbent the main jib*; violent squalls; strong winds; heavy sea; *set the top-gallant sails and mizzen staysail.*' Next watch, 'Cloudy weather and squally; strong breeze; heavy sea from the west, northwest; *the same sail as during the preceding watch.*' Next watch, 'Squally weather; strong breeze; *furled the mainsail at six o'clock.*' Next watch on the same day, 'The same weather; very strong swell; violent squalls.' The next day, 'Midnight of the 28th to midnight of the 29th.' In the first watch, 'Fine weather; some squalls; strong breeze becoming less at the end of the watch.' Second watch, 'Fine weather; fine breeze; *set the mainsail; royal, spanker and staysail.*' In the next watch, 'Fine weather; fine breeze; *all sails set.*' In the next watch, 'Squally weather; the sea falls more and more; *all sails set*; tested the steam gear; *found an increase of water in the hold; sounded 23 centimeters; cleared the pumps.*' In the next watch, 'Fine weather, the breeze softens; *all sails set.*' The next watch, 'Fine weather, light breeze; *all sails set.*'

And on that day did you make any notation in your own handwriting on the log-book with reference to the discovery of water in the hold?

A. Yes, sir; I wrote at the foot of the log not to fail to sound at every watch, and to give an account to the captain; if the water rises slowly and regularly, they must pump in the morning at 7:20 and in the evening at 4 o'clock.

Q. Does that log correctly state the facts as they occurred at the time with reference to the character of the weather? A. Yes, sir.

Q. During all of this time, or any part of this time, was your ship rolling? A. Yes, sir.

Q. Was that the natural roll of an ordinary ship in that kind of weather, or was it an extraordinary rolling?

A. The rolling was caused by this wind which started at the southwest, and shifted to the northwest, the sea having become very heavy by the cross-seas, and when the wind shifted to the northwest, the wind decreased, and the vessel not being stayed by the sails rolled heavily.

Q. Is it not usual if a vessel rolls very heavily, that is more than is expected of her, to make an entry in the log that the ship has been rolling?

A. Generally, but it was neglected.

Q. Was there a laboring of the ship prior to the leak starting, which was unexpected or unusual?

A. Yes, sir; the day after that night, the wind shifted from the southwest to the northwest.

Q. *Was the laboring of the ship upon that occasion very extraordinary?*

A. *The ship labored less than she did later after that storm at the Falkland Islands, but she did labor very much.*

Q. *Is it not usual for any ship to labor more or less in a cross sea without making water?*

A. *Certainly; the 'Duc d'Aumale' itself did it many times, probably, but this time she sprang a leak.*

Q. Then, that must have come from some weakness of the ship before she started, did it not? There must have been some weakness.

A. I don't think so.

Q. *How can you account for the ship springing a leak in weather which was fine, all excepting during one or two days at the most, and that weather not very bad, no storms?*

A. *I cannot give any other explanation.*

Q. *Then the only explanation that you have to give is that the ship strained in this kind of weather, and started a leak. That is the only explanation you can give?* A. Yes, sir.

Q. After the leak was started, how long did the good weather continue?

A. Variable weather, up to the storm that we had in the west of the Falkland Islands.

Q. About what date was that?

A. The 22d of November.

Q. There was no other bad weather, was there, up to that time?

A. We had one small gale in the latitude of Montevideo.

Q. The rest of the time you had fine weather, had you not? A. Yes, sir." (Ap. 194-8.)

There is no claim that the weather was other than the finest from the time of sailing to September 26th. And from then on to the 29th, when the leak developed, while squally, it was weather in which the ship carried full sail, save that in the first watch of the 28th the gaff topsail and main jib were torn and the royals and upper topgallant sails, staysails and spanker were taken in. The topgallant sails were taken in during the second watch, but the main jib was then set again. And before the end of the watch, the topgallant sails and main topsail were set. The mainsail was furled at six o'clock, but, on the morning watch of the following day (the 29th), the mainsail, royal, spanker and staysail were set. Thereafter full sail was again carried. *Not once did they strip her down to storm sails, for even during the second watch of the 28th when she was under her shortest sail, she was carrying her upper and lower topsails and foresail.* Except for that watch she continuously carried her topgallant sails. A ship cannot be under such sail in weather denominated as stormy.

It was, as appears from the following testimony of experienced ship masters, moderate weather, the kind

of weather reasonably to be expected in that locality at that season of the year.

After having had read to him the foregoing description of the weather given by the master of the "Duc d'Aumale," Captain Davison, a master of 29 years' experience, characterized it as follows:

"The weather you have described was from fine weather up to a moderate gale and back to fine weather again, a moderate gale from southwest to northwest,"

and stated that it was the character of weather which might be expected on the voyage in that position (Ap. 251). Captain Manning, a master for 18 years, described it:

"Well, it was between fine weather and a moderate gale, with a heavy cross sea. * * * "

(Ap. 272.)

Captain Fleming, who had been going to sea for 33 years and had been a master for 8 or 9 years, stated that the weather described by the master of the "Duc d'Aumale" was quite usual (Ap. 286). As to it, Captain Eben Curtis, a master of 30 years' experience, testified:

"Q. Captain, I will ask you to state whether or not that weather was in your judgment unusual or unexpected weather, or was it the usual expected weather in that vicinity in that season of the year?

A. *Oh, it was weather you could expect there at that time.*

Q. How would you characterize that weather?

A. As a moderately strong—well, *not much more than a strong breeze; you might say that it was more fresh winds; not heavy at all.*

Q. If you had a well-constructed, well-founded and well-stowed ship, in all respects seaworthy when she left Brest, would you have expected her to have so strained in that kind of weather as to have caused the leakage that the ‘Duc d’Aumale’ suffered from in this case?

A. I should not expect her to strain, or any well-founded vessel to strain in that weather to make her leak.

Q. If a vessel had encountered severe rolling such as might strain her, would you expect an entry to that effect to be made in the ship’s log?

A. It should be.

Q. If you were looking over a log, would you expect to find such an entry if that weather had been encountered?

A. Yes, sir, I would expect that log-book would give a proper description of the weather and anything unusual that occurred.

Q. Would the sea which would be made or created by the weather as detailed on the 26th, 27th, 28th and 29th of September, in your judgment, be a usual or an unusual sea for that vicinity in that season of the year?

A. *Nothing unusual about it.*” (Ap. 294-295.)

And Captain Gibson, who had been to sea for 39 years and a master for 27 years, said with respect to it:

“Now, Captain, I will ask you what your judgment is of the character of weather which was described by the Master in his testimony. Was that the usual, ordinary weather that you might expect or unusual, extraordinary weather?

A. *Just the usual, ordinary weather.*

Q. How would you describe it yourself in your own language, what kind of weather would you call it?

A. *Ordinary weather*, just as it was; it is entered in the log that way. *They never have had their upper top-sails in. The topgallant-sails were furled one night, I think it was.*

Q. If you were starting from Rotterdam or Brest, on a voyage to San Francisco, would you expect to encounter weather of that character in that vicinity?

A. Yes, sir; I should expect to.

Q. Would that weather in your judgment, produce any unusual strain upon the ship?

A. No, sir; it should not.

Q. If that ship had been seaworthy, in all respects sound, well founded, her cargo well and properly stowed, in your judgment would such weather have so strained her as to cause her to have sprung a leak? A. It should not.

Mr. HENGSTLER. That is subject to my objection.

Mr. CAMPBELL. It is so stipulated.

Q. Would the sea that would be created by weather of that character, be an unusual condition of sea or the usual condition as you might expect?

A. *It is the usual condition.*

Q. Is it anything unusual to have water on your decks? A. No, sir." (Ap. 329-330.)

What shall be said of the ship that strained under those conditions, for the only explanation that the master could give of the "Duc d'Aumale's" springing a leak was that she strained in that kind of weather? (Ap. 197). *Nothing can be said other than that she was unseaworthy.* It is too plain for further words. Her hull was not sufficiently tight, staunch and strong to be competent to resist the ordinary action of the seas (*Du Pont v. Vance*, 19 How. 162).

The Springing a Leak of the "Duc d'Aumale" in Moderate Weather Shortly After Commencing Her Voyage Raised the Presumption of Her Unseaworthiness on Sailing.

It is clear that, whatever may have been the character of the survey made of the "Duc d'Aumale" at Rotterdam in August, prior to her loading, the fact remains that she developed, within five days after leaving port, in ordinary sailing weather, a leakage which required the working of her pumps for forty minutes every twenty-four hours to keep the water down. Inasmuch as the vessel had not encountered any weather sufficient to account for her unseaworthy condition, the presumption is raised that she was unseaworthy on sailing.

It was so held by the Supreme Court in

Work v. Leathers, 97 U. S. 379; 24 L. Ed. 1012, wherein the court said:

"If a defect without apparent cause be developed, it is to be presumed it existed when the service began."

And of the presumption, Circuit Judge Wallace, delivering the opinion of the Circuit Court of Appeals for the Second Circuit in

The Warren Adams, 74 Fed. 413, 415, said:

"Where a vessel, soon after leaving port, becomes leaky, without stress of weather, or other adequate cause of injury, the presumption is that she was unsound before setting sail. The law will intend the want of seaworthiness, because no visible or rational cause, other than a latent or inherent defect in the vessel, can be assigned for the result."

The principle was stated by District Judge Thomas in
The Aggi, 93 Fed. 484, 491, (affirmed 107 Fed.
 300),

as follows:

“When a vessel, soon after leaving port, becomes leaky without stress of weather or other adequate cause of injury the presumption is that she was unseaworthy before setting sail” (citing cases).

In

Pacific Coast S. S. Co. v. Bancroft-Whitney Co.,
 94 Fed. 180,

wherein the facts giving rise to litigation were not dissimilar to those in the case at bar, in that the steamship “Queen of the Pacific” was beached at Port Harford to save her from foundering after she had sprung a leak at sea within twenty-four hours after leaving the port of San Francisco, without meeting with any accident or injury or encountering tempestuous or boisterous weather which could have caused the leak, District Judge Hawley, delivering the opinion of this court, said:

“In a proceeding of this character, and under the facts established in this case, the following principles of law are well settled * * *

“*That, although it may be presumed that a vessel is seaworthy when she sails, if soon thereafter a leak is found, without the ship having encountered a peril sufficient to account for it, the presumption is that she was not seaworthy when she sailed.* Higgle v. American Lloyds, 14 Fed. 143, 147; *The Gulnare*, 42 Fed. 861; *Work v. Leathers*, 97 U. S. 379; *The Planter*, 2 Woods 490, Fed. Cas. No.

11,207a; Cort v. Insurance Co., 2 Wash. C. C. 375, Fed. Cas. No. 3,257; Walsh v. Insurance Co., 32 N. Y. 427, 436.” (Italics ours.)

The decision in that case was afterwards reversed by the Supreme Court, but upon an entirely different point, namely, that the claims had not been presented within the time required by valid stipulations in the bills of lading.

In

The Arctic Bird, 109 Fed. 167, 170,

a case arising out of the sinking of a barge in tow from Kotzebue Sound to the head of navigation on the Kubuk River, Alaska. after it had proceeded on a voyage for six hours, Judge De Haven said:

“Seaworthiness has been defined as ‘that quality of a ship which fits it for carrying safely the particular merchandise which it takes on board’ (The Thames, 10 C. C. A. 232, 61 Fed. 1014); or, in the language of Baron Parke, to be seaworthy a vessel must be ‘in a fit state as to repairs, equipment, and crew, and in all other respects, to encounter the ordinary perils of the voyage insured, at the time of sailing upon it’ (Dixon v. Sadler, 5 Mees. & W. 405). And in Dupont De Nemours v. Vance, 19 How. 162, 15 L. Ed. 584, the supreme court said: ‘To constitute seaworthiness of the hull of a vessel in respect to cargo, the hull must be so tight, stanch, and strong as to be competent to resist all ordinary action of the sea, and to prosecute and complete the voyage without damage to the cargo under deck. * * *’ *In view of this rule, as to what constitutes seaworthiness, it has been uniformly held that if a vessel springs a leak, and founders, soon after starting upon her voyage, without having encountered any storm or other peril to which the leak can be attributed, the pre-*

sumption is that she was unseaworthy when she sailed. The Planter, 2 Woods, 490, Fed. Cas. No. 11,207a; Talcott v. Insurance Co., 2 Johns. 124, 3 Am. Dec. 406; Cort v. Insurance Co., 2 Wash. C. C. 375, Fed. Cas. No. 3,257; Walsh v. Insurance Co., 32 N. Y. 427; Paddock v. Insurance Co., 11 Pick. 227; Work v. Leathers, 97 U. S. 379, 24 L. Ed. 1012. Thus, in the case last cited, the court said: 'If a defect without any apparent cause be developed, it is to be presumed it existed when the service began.' So, also, in the case of Walsh v. Insurance Co., 32 N. Y. 436, the court observed: 'Where the inability of a ship to perform a voyage becomes evident soon after leaving port, and it founders without stress of weather or other adequate cause of injury, the presumption is that this inability existed before setting sail, and that it is due to some latent defect which rendered the vessel unseaworthy.' The barge, when unloaded and just before the commencement of the voyage upon which it was lost, was towed a distance of 12 miles without leaking. This is relied upon by the petitioners as proof of its seaworthiness, but can be given no such effect in the face of the fact that the barge sunk without having encountered a peril of the sea. In my opinion, but one conclusion can be drawn from the evidence, and that is that the barge was unseaworthy. Its foundering, under the circumstances stated, can only be accounted for upon the theory that it was not strong enough to sustain the strain to which it was subjected by the towage and weight of its cargo." (Italics ours.)

The words of Judge De Haven may well be paraphrased and applied to the "Duc d'Aumale":

"But one conclusion can be drawn from the evidence, and that is that the vessel (barge) was unseaworthy. Its leaking (foundering), under the circumstances stated, can only be accounted for upon the theory that it was not strong enough to

sustain the strain to which it was subjected by the ordinary weather encountered (towage) and weight of its cargo.”

District Judge Wolverton, writing the opinion in

Oregon Round Lumber Co. v. Portland & Asiatic S. S. Co., 162 Fed. 912,

affirmed the principle in the following language:

“It not infrequently transpires that a vessel, after entering upon her voyage or engaging in the service for which she is dispatched, becomes unseaworthy, and damage ensues, without any apparent cause from stress of weather or collision in any way, or undue or negligent abuse in handling and navigating her, and in every such case the presumption obtains that she was unseaworthy at the time of entering upon her service. *How else could her condition be accounted for?*” (Italics ours.)

The principle was recognized by this court in the case of the

Steamship Wellesley Co. v. C. A. Hooper & Co., 185 Fed. 735, 738,

Circuit Judge Gilbert saying:

“We think it clear that the accident, occurring as it did, and as thus described by the master, raises a strong presumption of unseaworthiness.”

The rule was enforced by the Circuit Court of Appeals for the Fifth Circuit in

Carolina Portland Cement Co. v. Anderson, 186 Fed. 145, 147,

wherein it was said:

“We now hold that the William H. Sumner was not seaworthy at the inception of the voyage under

the test of seaworthiness as given in The Silvia, 171 U. S. 462-464, 19 Sup. Ct. 7, 43 L. Ed. 241, because the proof is that within a few hours after leaving port, and before encountering any peril of the sea, she sprung a leak from defective butts in the bottom of the vessel; and that, in addition, her steam pump was not in good order and broke down when put in use, and from these circumstances the presumption of unseaworthiness arises." (Italics ours.)

And district Judge Holt in

The River Meander, 209 Fed. 931,

a case of leakage developing on the voyage, stated the rule as follows:

"In my opinion, if a ship is shown to be unseaworthy during a voyage, the inference may be drawn, in the absence of any explanation to the contrary, that she was unseaworthy when she started. Cargo owners usually cannot prove unseaworthiness at the time a voyage begins.

"It is the duty of the shipowner to know that his ship is seaworthy before the voyage begins, and if he does know it he can prove it. If a vessel proves to be unseaworthy during a voyage, the burden should be on the shipowner to prove affirmatively that she was seaworthy at the time the voyage began." (Italics ours.)

The late case of

Benner Line v. Pendleton, 210 Fed. 671,

is in point, for the schooner "Edith Alcott" sprang a leak in the first heavy weather encountered, three days after leaving New York. In holding her to be unseaworthy, District Judge Holt said:

"The respondent has given elaborate evidence to the effect that the ship was kept in very good

condition; that she had been carefully inspected, overhauled, and put in order before the voyage; and that she had a rating with the insurance companies as high as is ever given any vessel of her age. I have no doubt that her owners believed her to be seaworthy. *But facts in such a case speak louder than words, and the facts that she sprang so bad a leak on the first night of heavy weather that occurred upon her voyage, and that there is no adequate explanation given of it, is, in my opinion, not consistent with her being seaworthy at the beginning of the voyage.*" (Italics ours.)

And in affirming the decision, the Circuit Court of Appeals said of the rule:

"While the weather was heavy, there was nothing so extraordinary about it that a ship in a seaworthy condition should not have been able to stand the strain. The fact that the vessel sprang so bad a leak, and that no satisfactory explanation of the fact has been made, indicates to us, as it did to the court below, that the vessel was not seaworthy as to her hull at the beginning of the voyage." (217 Fed. 497, 503.)

Applying the settled rule of law as announced in these cases to the circumstances and conditions under which the evidence shows that the leak in the "Duc d'Aumale" developed, it necessarily follows that the strongest presumption must be raised against the vessel that she was in an unseaworthy condition at the commencement of her voyage. Until sufficient cause other than unseaworthiness is shown to have brought about the leakage, she must stand condemned in the eyes of the law as an unseaworthy vessel, with all of the liabilities attaching thereto.

**The Increase in the Leakage Upon Encountering the Heavier
Weather to be Expected Off the Falkland Islands Con-
clusively Established the Unseaworthiness of the
“Duc d’Aumale.”**

The fair weather continued until November 22d, during which intervening period the leak was controlled by the regular pumping of 20 minutes morning and evening. On November 22d, however, the “Duc d’Aumale” then being in 49° 37’ south latitude and 66° 21’ west longitude, the weather and sea increased, as was to be expected, necessarily subjecting the vessel to greater strains than those experienced either in the moderate weather of September or in the fair weather subsequent thereto. *The result was that the leakage immediately increased* to such proportions that the master, after consultation with the crew, decided to run for the Falkland Islands. The master described the weather and the condition of his vessel during that time as follows:

“A. Nothing happened particularly until the 22d of November.

Q. Where was the vessel on that day?

A. The vessel was about forty-nine degrees, thirty-seven minutes south latitude, and 66 degrees, 21 minutes west longitude. On that date the weather was fine until 9 o’clock at night. The wind increased in force rapidly, and we had to take in all sails but the *foresail*, *two lower topsails*, and the *lower staysails*. At 11 o’clock, the wind blew a storm, and the sea became heavier very rapidly. At twelve o’clock, in a gust, we lost the topmast stay-sail and the mizzen stay-sail. In a while the sea became tremendous, and we lost the fore stay-sail. The ship not being stayed by the sails we had lost she rolled terribly. The decks

were full of water. The decks being full of water, and the ship rolling heavily, we could not get the exact soundings.

Q. Could you pump?

A. No, sir; we could not pump. I went myself in the pump well, and I saw there was an increase of water, but we could not pump because the bottom of the pipe at each rolling was dry, the vessel being on her side. Another survey was made at four o'clock in the afternoon, and we saw the same thing, the sea being still very heavy, and the wind shifting to the southwest, the ship in a cross sea. We wore the ship around at 8 o'clock. The sea was very high until the 25th of November at 8 o'clock A. M. On the 24th of November, coming around westerly at 2 o'clock P. M., we wore the ship around to take a starboard tack. I ordered the pumps to be sounded by the carpenter when the ship was upright, and the carpenter reported that he found one meter and 25 centimeters in the hold, so that *the water had increased rapidly since the morning*. After the wearing of the ship, I set one watch to the pumps, and ordered an examination of the life-boats made to see that they were in order. At six o'clock, the wind freshened again, big seas coming from every part; the decks being always covered with water it was very difficult to work the pumps. *At six o'clock, we found one meter, and fifty-five centimeters in the hold.* At six o'clock I called the crew aft and explained to them the situation, and we resolved to take refuge in the Falkland Islands for the saving both the cargo and the ship. At the same hour we kept her off, and made for the Islands.

Q. We do not need the further details until you get to the place where you beached the ship.

A. That is a few hours later. Both watches were relieving each other at the pumps every half hour, so they were working continually, and *I saw that the water did not increase so much while the ship was running before the wind*. The ship was

steering very badly when we were close to Roy Cove. We entered the cove at 4:30 and at 4:35 the ship was beached at 500 meters from the entrance to the cove. *At that time the sounding of the pump was two meters and 27 centimeters, the ship having a list of 6 degrees to starboard.*" (Ap. 165-7.)

* * * * *

"Q. Now, the log records stormy weather on the page marked 'From midnight of the 22d to midnight of the 23d of November.' Up to that time, had there been any noticeable change in the amount of the water that the ship took in?

A. *I have always noticed that the water was rising one centimeter every hour.*

Q. What you mean is, that there was a uniform amount of water coming in to the ship each day up to the 22d of November, which amounted to about one centimeter per hour?

A. Yes, sir.

Q. When the storm of the 22d came on, did it come on suddenly at midnight of that day, or was it coming on for some time on the previous day?

A. It came progressively. It began with north wind, the gale fell, shifting to the north-west and getting fresh.

Q. *The storm really began to come on, then, on the last quarter of the 21st, namely, from 8 o'clock at night to midnight?*

A. Yes, sir.

Q. *And in the second quarter on the morning of the 22d, the discovery was made that the water had increased abnormally. What hour was that second watch?*

A. *From 4 to 8 o'clock in the morning of the 23d.*

Q. And after that time, it was impossible, you say, to have any control over the water with the pumps?

A. *We could not control the water, but we were making an examination of the pump-well.*

Q. *But you were unable to pump the water out excepting a small part of it?*

A. *Yes, sir.*

Q. *You could not control it?* A. *No, sir.*

Q. *Now, Captain, during that time, when the leak increased so largely, what sail was your ship carrying? Can you tell by looking at your log?*

A. *The foresail and two lower topsails. We had lost the jib and lower staysails.*

Q. *How long before?*

A. *We lost the staysails at midnight, and the fore staysail between midnight and 4 o'clock.*

Q. *How many miles an hour were you making during that watch?* A. *About 4 knots.*

Q. *In what direction was the wind then?*

A. *Southwest.*

Q. *Was that a free wind or a head wind?*

A. *It was a head wind.*

Q. *Now, before this last storm took place, had the vessel been rolling very much?*

A. *Not much, excepting in a storm on the 5th of November.*

Q. *In your opinion, Captain, was the hole that was discovered in the ship's hold, and which was caused by the loss of a rivet, sufficiently large to account for the immense amount of water that got into the ship immediately that she began to have bad weather?*

A. *I think there was something else.*

Q. *Is it not your opinion from all that you have been able to ascertain, that the laboring of the ship caused the butt ends of the plates to separate or to open, and let water in between the plates?*

A. *I think that the ship made a little water by the butt ends.*

Q. *That little water that you speak of made by the butt ends added to the water that would*

come in by the rivet hole, would those two together be sufficient to account for the immense amount of water that came in so rapidly when you struck the heavy weather? A. Yes, sir.

Q. Is it your opinion, Captain, that the water did actually come in in part by the rivet hole before arriving at Roy Cove? A. Yes, sir.

Q. And how large was that rivet hole in diameter or in circumference?

A. It was a rivet of 23 millimeters in diameter when the ship was new.

Q. Was it any larger after the ship became older? A. No, sir, it was the same.

Q. Now, when the ship was making, as you said a little while ago, in your opinion, about one centimeter an hour of water, was it your opinion that at that time the rivet was already out? A. The rivet was not out.

Q. Have you any opinion what it was that was causing the ship to leak up to the time that the rivet fell out?

A. My opinion is that the rivet started to get loose in the first storm of the 27th of September, and that the same rivet jumped out in the storm of the 23d of November." (Ap. 198-200.)

While the weather met on and after November 22d was much more severe than the moderate weather of September, it was the kind of weather to be reasonably expected in the lower latitudes in the vicinity of Cape Horn at that season of the year. The opinions of the ship masters were in unanimous accord upon that point. Captain Davidson said of the weather described by the master of the "Duc d'Aumale":

"Well that is the ordinary kind of weather that you might expect there * * * It is a very common experience there because the wind and weather both change very rapidly." (Ap. 242.)

Of the cross sea encountered, he testified:

“That is an ordinary experience off of the Horn.” (Ap. 242.)

Captain Manning did not think that it was weather different from what might be expected on a voyage around Cape Horn from the South Atlantic to the South Pacific in November (Ap. 263). And Captain Fleming said that the weather was quite usual (Ap. 280). Captain Curtis spoke of it as follows:

“Q. How many times, in your experience, do you suppose you have passed around Cape Horn?

A. Oh, I should say 20 times or more.

Q. What kind of weather do you ordinarily expect to encounter on a voyage from the South Atlantic to the South Pacific, around the Horn, in the months of November and December?

A. Well, we expect most of the weather to be pretty bad.

Q. What effect does the weather that you may expect have upon the ship? Describe it as well as you can, so that in that way to indicate to us the character of the weather.

A. Well, strong winds kick up heavy seas and in all heavy seas a ship will strain more or less.

Q. Will she have any water on her deck?

A. If she is a loaded ship she will most always have water on the deck, more or less.

Q. Have you ever found it necessary to shorten sail when you are in the vicinity of the Horn?

A. Yes, very frequently.

Q. Would you, if you were in the vicinity indicated on the chart marked Libellant's Exhibit 'C' to the northwestward of the Falkland Islands, which is approximately the location of the 'Duc d'Aumale' on the 22d of November—do you see that there? A. Yes.

Q. Now, bearing that location in mind, Captain, I will ask you whether or not the weather you there

encounter is in any very great particular different from that in the immediate vicinity of the Horn?

A. Well, the winds are very much the same, but the seas are very different.

Q. What difference is there, Captain?

A. As a rule, you are closer to the land and the wind is mostly off the land, the greater part of it, and you do not experience as heavy seas there as you would down in the unbroken ocean.

Q. State whether or not you might expect in that vicinity seas such as would throw water on to the deck of your vessel?

A. Oh, yes, a great deal of it.

Q. Is an experience of that sort confined to any particular waters or any particular localities of the oceans, taking the water on the deck of your vessel?

A. No. In all oceans, where you are far enough south or far enough north to get bad weather, you have the same experience, in a great measure.

Q. When you strike the ordinary bad weather you may expect in the vicinity indicated by the chart, what kind of sail would you carry?

A. It depends altogether upon the weather we experience there at the time.

Q. Well, if it is the usual bad weather, what sail would you carry?

A. Well, if it is blowing a moderate gale we would carry the whole top-sails and the whole fore-sails. With a heavy gale we would probably come down to the three lower top-sails.

Q. *If you should encounter a gale of wind in that vicinity which compelled you to shorten sail to your three lower top-sails, would that be an unexpected and an unusual occurrence?*

A. No, it would be more unusual if you did not have some weather of that kind.

Q. If you were encountering such weather as compelled you to shorten sail to your three lower top-sails, will you state whether or not, Captain, you would expect a loaded vessel to have water on her deck?

A. We should expect her to have water on her deck, yes.

Q. Will you state whether or not, Captain, it is usual or unusual to have your ship so roll at sea that she will roll her bulwarks under?

A. Well, that is a very heavy rolling when you roll your bulwarks under.

Q. Well, do you expect it?

A. We get it sometimes, yes.

Q. Is it necessary to roll your bulwarks under to take water on the deck?

A. No, sir, not at all.

Q. Captain, did you hear the testimony read this morning? A. Yes.

Q. For the purpose of saving time I will ask this question: have you in mind the condition of the weather which was detailed in the log for the gales we will call it, off the Falkland Islands?

A. I think I have, yes.

Q. *Bearing in mind what you heard read from the log, I will ask you whether or not in your judgment, Captain, that weather was the usual or the unusual, the ordinary or the extraordinary weather such as you might expect to encounter or would not expect to encounter in that vicinity at that season of the year?*

A. *I should think it would be about the usual thing. Sometimes you go down there with very little bad weather, but you almost always get some.*" (Ap. 290-3.)

Captain Gibson characterized it as the usual weather and, in sailor-like fashion, pointed out that the "*Duc d'Aumale*" was carrying her foresail all through it. This appears from the following:

"I ask you whether or not in your judgment that was weather which was usual and might be expected in that vicinity on a voyage of that kind at that season of the year or was unusual or extraordinary weather?"

A. *That is the usual weather. That ship was carrying a foresail all through. That ship never took that foresail in by his log-book. Her stay-sail blew away and I suppose some old sails. The foresail was set all that time. She never took it in.*

Mr. HENGSTLER. Q. You do not know that?

A. *I know this by the log-book. The log-book is supposed to give every sail taken in off of the ship.*

Mr. CAMPBELL. Q. What kind of sails do you usually carry on your vessel in preparation for rounding the Horn?

A. Our best sails, and use them all we can.

Q. When you are encountering bad weather such as you might expect on a voyage of that sort, what kind of sail do you carry?

A. According to the weather. *If it is blowing heavy we carry what sail the ship will stand. We use our judgment. If we can carry a foresail we know it is not blowing a heavy gale of wind,—if she is carrying a foresail. If you are running before the wind you might. If you are laying to with a foresail with a head reach, you cannot do it. A foresail is a big sale and takes all hands to handle it.*

Q. *If you have got an extraordinary heavy gale what do you trim down to?*

A. *To two lower top-sails; perhaps even to one lower top-sail.*

Q. *Would it be unexpected weather on a voyage of that kind if you are compelled to trim down to lower top-sails?*

A. No, sir. *You always expect something of that kind coming round the Horn. You are always expecting bad weather, summer or winter.*

Q. Would the sea which would be raised by the weather of the character described, in your judgment be unusual, extraordinary, unexpected weather or the usual expected weather?

A. You will get a sea most anywhere. You will get sea when calm weather has been on. As long as it has been blowing a few hours you will get a sea on.

Q. *That does not answer my question, whether the character of sea raised by this kind of weather, would be usual or unusual or unexpected?*

A. *No, sir, it is the usual sea.*

Q. What kind of weather do you customarily have in that vicinity?

A. Sometimes good weather and sometimes changes. Perhaps 4 hours blowing a gale of wind and at other times it would be moderate. You would be taking in sails a good part of the time working your way around the Horn.

Q. *If this vessel was carrying her foresail during all that time what in your judgment was the kind of weather she was having?*

A. *An ordinary good strong blow; an ordinary gale; it was not a heavy gale.*" (Ap. 322-324.)

There is no evidence to detract from the characterizations of the weather made by the experienced masters. When they were unanimous in saying, in effect, that the "Duc d'Aumale" encountered, on November 22nd, and following days, the kind of weather reasonably to be expected in those regions at that season of the year, the District Court was justified, indeed it could not do otherwise, in finding that in no other way than that the "Duc d'Aumale" was unseaworthy at the commencement of her voyage, could the leak which occurred on the 28th of September, and her subsequent condition near the Falkland Islands, be satisfactorily accounted for. In the words of Judge Wolverton, *supra*, How else could her condition be accounted for?

It certainly could not be rightly said that the weather encountered on and after November 22nd was of such hurricane velocity and destructiveness as to render unseaworthy a vessel previously sufficient in hull to

encounter the weather reasonably to be anticipated. There is no suggestion of any damage other than the carrying away of a few sails, a most common occurrence at sea. Her decks were not strained or seams opened or oakum disturbed; no injury was done to her deck houses, hatches or gear. The simple fact is that very shortly after the heavy weather was encountered (which necessarily increased the pitching and rolling of the ship and thereby subjected her to greater strains than previously experienced) and before the heaviest of it came on, the existing leakage increased. During all of that time the ship was under lower topsails and carrying a foresail which, as Captain Gibson in effect pointed out, was not a sail to be carried in extraordinarily heavy weather (Ap. 322-4). It was a good strong blow to be sure, but of a character to be reasonably anticipated.

It afterward developed that a rivet of 23 millimeters in diameter had dropped from the ship's bottom, but that alone was not sufficient to account for the large increase in water on encountering the storm of November 22nd. *The master thought that there was something else, and that something, in his opinion, was the making of water by the butt ends of the plates* (Ap. 199-200). The reasonableness of this conclusion is shown by the fact that the "Duc d'Aumale" made less water on running before the wind (Ap. 167), and that some of her butt seams were found to be open on docking at Buenos Ayres.

It was a pure case of leakage developing under the stresses and strains of weather which the "Duc d'Au-

male'' was almost certain to meet on the voyage around the Horn. Whether the loosening of the rivets and the opening of the butt seams were due to their inherent condition on sailing, or resulted from the strain upon the hull produced by the stowage of her cargo, the fact remains that the influx of water was due to unseaworthiness, the disastrous results of which were consummated in the beaching at Roy Cove. She was not in fit condition to meet the most ordinary kind of weather immediately on leaving port and still less capable of encountering the severer weather of the lower latitude. She thus failed to meet the tests of unseaworthiness.

In *Dupont v. Vance*, 19 How, 162; 15 L. Ed. 584, Mr. Justice Curtis defined the test of unseaworthiness as follows:

“It is the hull of the vessel which was alleged to have been unseaworthy. To constitute seaworthiness of the hull of a vessel in respect to cargo, the hull must be so tight, staunch, and strong, as to be competent to resist all ordinary action of the sea, and to prosecute and complete the voyage without damage to the cargo under deck.”

And in *The Arctic Bird*, supra, Judge De Haven prescribed it to be:

“Unseaworthiness has been defined as ‘that quality of a ship which fits it for carrying safely the particular merchandise which it takes on board.’ (The Thames, 10 C. C. A. 232, 61 Fed. 1014); or, in the language of Baron Parke, to be seaworthy a vessel must be ‘in a fit state as to repairs, equipment and crew, and in all other re-

spects, to encounter the ordinary perils of the voyage insured, at the time of sailing upon it' (Dixon v. Sadler, 5 Mees. & W. 405).''

To the same effect was the holding of this court in *Steamship Wellesley Co. v. C. A. Hooper & Co.*, supra, wherein Circuit Judge Gilbert said:

“And the vessel is not seaworthy when from her improper loading she is rendered unfit to encounter the ordinary perils of navigation which could reasonably have been anticipated on the projected voyage. The Colima (D. C.) 82 Fed. 665; The Whitlieburn (D. C.) 89 Fed. 526; The Oneida (D. C.) 108 Fed. 886; Id., 128 Fed. 687, 63 C. C. A. 239; The G. B. Boren (D. C.) 132 Fed. 887.”

In *Benner Line v. Pendleton*, 217 Fed. 497, 501, the Circuit Court of Appeals for the First Circuit said:

“To constitute unseaworthiness the hull must be so tight, staunch and strong as to be competent to resist all ordinary action of the sea, and to prosecute and complete the voyage without damage to the cargo.”

By every test the unseaworthiness of the “Duc d’Aumale” is established. She was not sufficiently tight, staunch and strong to withstand the winds and seas which were to be expected on the voyage from Rotterdam to San Francisco. To save her from the consequences of her unseaworthiness, the “Duc d’Aumale” was beached at Roy Cove, damaging her cargo.

**THE UNSEAWORTHINESS WAS DUE EITHER TO DEFECTS IN
THE HULL OR TO IMPROPER STOWAGE OF CARGO.**

**The Hull Was Defective at Least in Respect to the Rivets
and Butt Seams.**

On drydocking the "Duc d'Aumale" at Buenos Ayres, one rivet was discovered to be entirely gone one meter forward of the mizzen mast and about one foot off the keel on the starboard side. The master admitted that several other rivets were leaking, especially very close to the foremost (Ap. 179-180), but the report of the Buenos Ayres' surveyors stated that "*200 to 300 rivets leak slightly*" (Resp. Exhibit 5). The cement was broken at the butt ends of the plates (Ap. 180, 202), requiring re-cementing, the insertion of steel blades and caulking (Ap. 202). The captain testified to the leakage of the ship, being produced partly by defective butt ends (Ap. 210).

There is no evidence that that condition, at least in part, did not exist at the commencement of the voyage at Rotterdam or at Brest. Certain it is that the leakage which was discovered on September 29th was partially caused by these openings in the hull, for it will be recalled that the master testified that in his opinion the increase of leakage in the storm of November 22nd indicated that water was coming in, not only through the hole made by the loosened rivets, but through the butt end seams (Ap. 200).

**The Stowage of the Cargo Was Improper and Produced
Upon the Hull Sheering Strains Which Tended to Open
the Butt Seams.**

The "Duc d'Aumale" was loaded with 2015 tons of coke and 660 tons of pig-iron, 60 tons of the pig-iron

being stowed in the between decks immediately abaft the main hatch, and 600 tons in the lower hold immediately abaft the line of the main hatch, in a block 63 feet long and 36 feet wide at its forward-end and 23 feet wide at its after-end.

The stowage of that quantity of pig-iron in one body in the lower hold was condemned by the surveyors appointed by the French Consul and by Mr. Eck and Captain Schutz, who examined the vessel in her damaged condition on the drydock at Buenos Ayres, as having strained the ship too much on the first part of the voyage. A change in stowage was advised by the surveyors (Ap. 187, 203, Libellant's Exhibit A). On re-stowing, however, the large block in the lower hold was divided, 350 tons being placed in one pile on the forepart of the after-hatch, a small pile on the after part of the after-hatch and a smaller lump abaft of the foremast (Ap. 187).

That the stowage was improper in the distribution of its weights was also the opinion of Captains Curtis and Gibson, disinterested witnesses, who criticized it for the strains it produced upon the hull (Ap. 297-9, 302-7, 317, 331-7).

The testimony of Mr. David W. Dickie, a naval architect and engineer, makes it clear that the stowage of the 600 tons of pig-iron in one body immediately abaft the line of the main hatch, produced an excessive sheering strain on the bottom of the vessel in the region of the mizzen mast at the end of the pig-iron, and between the after end of the main hatch and the main mast, with a slight excessive strain in the region of

the foremast (Ap. 362, 371). This strain as explained by Mr. Dickie would tend to spring the butt ends and to cause them to open as they did. That they opened before the stranding, was established by the greater inflow of water as the strains upon the vessel increased, a condition admitted by the master (Ap. 200). This sheering strain, in the opinion of Mr. Dickie, was materially lessened by the redistribution of the cargo made at Buenos Ayres (Ap. 370).

None of the witnesses called by the appellants, unless it was Mr. Frear, testified with respect to the sheering strain produced by the stowage of the pig-iron in one body, but only concerned themselves with the questions of stability and trim, an entirely different matter and one solely affecting the sailing qualities of the ship, and not the condition which would tend to open the butts. As regards Mr. Frear's criticism of Mr. Dickie's opinion, it was evident from Mr. Dickie's reply thereto that such criticism fell short of casting doubt upon the correctness of Mr. Dickie's conclusions. His expert opinion measured up to the actualities of the voyage.

Testimony was given by those who surveyed the vessel at Rotterdam and by others called as witnesses, that the ship was sound in hull and properly stowed.

The evidence is thus divided, but with the ever-present fact of unseaworthiness on the side of those who condemned the stowage. It is certain that the "Duc d'Aumale's" rivets loosened and her seams opened in the course of the voyage in weather to be reasonably

anticipated. And such condition of hull could have been, and was, in the judgment of the surveyors who saw the vessel on drydock at Buenos Ayres and by Naval Architect Dickie, produced by the stowage which they criticized, and it was rectified at Buenos Ayres. It is significantly corroborative of the opinions of the experts that thereafter on the long voyage via the Cape of Good Hope from Buenos Ayres to San Francisco, when the cargo had been restowed and the weight distributed so as to lessen the sheering strain, the vessel met with no further difficulties.

**THE CAUSE OF THE LOSS BEING THE UNSEAWORTHINESS
OF THE "DUC d'AUMALE", HER OWNER IS LIABLE FOR ALL
DAMAGES TO CARGO RESULTING THEREFROM.**

The damages to the cargo for which the District Court entered a decree in favor of appellees were, as we have pointed out, caused by the unseaworthiness of the "Duc d'Aumale." Whatever, therefore, may have been the character of the examination made by the surveyors at Rotterdam, or the extent of the repairs then placed upon the vessel, it did not relieve the owner from the liability cast upon it by the unseaworthiness of the ship. That the absolute warranty of seaworthiness implied in every charter and contract of affreightment is not complied with merely by the owner's exercise of due diligence to make the ship in all respects seaworthy, and does not free the owner from liability for loss resulting from unseaworthiness, has been definitely settled by a long line of decisions of the Supreme Court, and notably in the case of

The Carib Prince, 170 U. S. 655, 42 L. Ed. 1081,
1086,

wherein Mr. Justice White, delivering the opinion of the court said:

“Now, it is patent that the foregoing provisions deal not with the general duty of the owner to furnish a seaworthy ship, but solely with his power to exempt himself from so doing by contract, when the particular conditions exacted by the statute obtain. *Because the owner may, when he has used due diligence to furnish a seaworthy ship contract against the obligation of seaworthiness, it does not at all follow that when he has made no contract to so exempt himself he nevertheless is relieved from furnishing a seaworthy ship, and is subjected only to the duty of using due diligence.* To make it unlawful to insert in a contract a provision exempting from seaworthiness where due diligence has not been used, cannot by any sound rule of construction be treated as implying that where due diligence has been used, and there is no contract exempting the owner, his obligation to furnish a seaworthy vessel has ceased to exist.” (Italics ours.)

The implied warranty of seaworthiness was recognized by this court in

Corsar v. J. D. Spreckels & Bros. Co., 141 Fed.
260,

and of it Circuit Judge Ross, delivering the majority opinion of the court, said:

“Now, the contract on the part of the ship required her to be in all respects seaworthy for the voyage she undertook. Indeed, unless otherwise expressly stipulated, an implied warranty of seaworthiness of the ship at the time of commencing the voyage accompanies every contract of

affreightment. *The Caledonia*, 157 U. S. 130, 131, 15 Sup. Ct. 537, 39 L. Ed. 644. And this includes, not only a ship seaworthy in hull and equipment, which conditions it is conceded the *Musselcrag* met, but also seaworthy in respect to the stowage of the cargo. *The Edwin I. Morrison*, 153 U. S. 211, 14 Sup. Ct. 823, 38 L. Ed. 688; *Carver on Carriage by Sea*, sec. 18; *Sumner v. Caswell* (D. C.), 20 Fed. 249; *The Colima* (D. C.), 82 Fed. 665; *The Whitlieburn* (D. C.), 89 Fed. 526; *The Oneida* (D. C.), 108 Fed. 886; *Id.*, 128 Fed. 687, 63 C. C. A. 239; *The William Power* (D. C.), 131 Fed. 136; *The G. B. Boren* (D. C.), 132 Fed. 887."

And in the late case of

Benner Line v. Pendleton, 217 Fed. 497, 500,

the Circuit Court of Appeals for the Second Circuit reaffirmed the absolute undertaking of seaworthiness, Circuit Judge Rogers saying:

"There can be no question but that it is the duty of the shipowner to provide a ship which is fit and competent for the cargo and particular service for which she is engaged. The carrier either expressly or impliedly warrants the seaworthiness of the vessel at the commencement of the voyage. *The Carib Prince*, 170 U. S. 655, 18 Sup. Ct. 753, 42 L. Ed. 1181. *And this warranty that the vessel is fit at the beginning of the voyage is an absolute undertaking, which is not dependent on the owner's knowledge or ignorance that the ship is in fit condition to undergo the perils of the sea.* *The Caledonia*, 157 U. S. 124, 15 Sup. Ct. 537, 39 L. Ed. 644. The warranty covers latent defects, not ordinarily susceptible of detection, as well as those which are known or discoverable by inspection. In *The Edwin I. Morrison*, 153 U. S. 199, 210, 14 Sup. Ct. 823, 825, 38 L. Ed. 688 (1894), the Supreme Court adopted the language used by Mr. Justice Gray in the Circuit Court in which he said:

“ ‘In every contract for the carriage of goods by sea, unless otherwise expressly stipulated, there is a warranty on the part of the shipowner that the ship is seaworthy at the time of beginning her voyage, and not merely that he does not know her to be unseaworthy. * * * *The warranty is absolute that the ship is, or shall be, in fact seaworthy at that time, and does not depend on his knowledge or ignorance, his care or negligence.*’ ”

And in *The Caledonia*, 157 U. S. 124, 130, 15 Sup. Ct. 537, 540, 39 L. Ed. 644 (1895), the above doctrine is reaffirmed and Mr. Chief Justice Fuller said:

“ ‘The proposition that the warranty of seaworthiness exists by implication in all contracts for sea carriage, we do not understand to be denied; but it is insisted that the warranty is not absolute, and does not cover latent defects not ordinarily susceptible of detection. If this were so, the obligation resting on the shipowner would be, not that the ship should be fit, but that he had honestly done his best to make her so. We cannot concur in this view. *In our opinion the shipowner’s undertaking is not merely that he will do and has done his best to make the ship fit, but that the ship is really fit to undergo the perils of the sea and other incidental risks to which she must be exposed in the course of the voyage; and, this being so, that undertaking is not discharged because the want of fitness is the result of latent defects.*’ ” (Italics ours.)

As neither the charter party nor the bills of lading contracted against the obligation of seaworthiness, the liability of the owner of the “Duc d’Aumale” is fixed, and the decree of the District Court grounded thereon should be affirmed.

APPELLANT'S CONTENTIONS AS TO SEAWORTHINESS OF THE
"DUC d'AUMALE" ARE UNSOUND.

Presumption of Seaworthiness.

Appellant's contention as to the seaworthiness of the "Duc d'Aumale" are grounded upon the assertion that there is in law the principle that in the absence of proof to the contrary, a vessel will be presumed to be seaworthy. Such a statement is cited from a parenthetical remark of Mr. Justice Brown in *The Chattahoochee*, 173 U. S. 540, 550, which, in a reference to the third section of the Harter Act, was the purest *obiter dicta*. This presumption is not in accord with the weight of authority, for it has long since become a settled rule of construction of the Harter Act that the owner must show affirmatively the exercise of due diligence to make his vessel seaworthy before he can invoke the limitations of the third section of the act. Seaworthiness is not presumed. It was so held in the later case of

The Wildcroft, 201 U. S. 378; 50 L. Ed. 794, 797, wherein Mr. Justice Day, delivering the opinion of the court, said:

"To permit a cargo of sugar to be injured by the introduction of fresh water in the manner shown, but for the provisions of this act (Harter Act), would have made a case of clear liability against the owner; and when the statute has given immunity against such loss by reason of error in navigation or management, it does so upon the distinct condition that the owner shall show that the vessel was in all respects seaworthy and properly manned, equipped, and supplied for the voyage; or, if this cannot be established, that he has used due diligence to obtain this end. *The discharge of this duty is not left to any presumption in the*

absence of proof. It is the condition precedent, compliance with which is required of the vessel owner in order to give him the benefit of the immunity afforded by the act."

By this authority there is then no presumption of seaworthiness which overcomes or offsets the presumption (inference) of unseaworthiness arising from the springing a leak of the "Duc d'Aumale" so shortly after the commencement of her voyage without her having encountered sufficient cause therefor. It is idle for appellant to suggest that the ship may have struck something, for even the master does not make that claim. A somewhat similar theory was exploded in *Benner Line v. Pendleton, supra*.

Seaworthiness of the Hull.

The fact that the surveyors who examined the "Duc d'Aumale" before loading did not admit her actual unseaworthiness does not prove her seaworthiness on sailing. They may have exercised due diligence to make her seaworthy, but that act would not *per se* render her seaworthy, or overcome the presumption or inference of unseaworthiness arising from the subsequent leakage. It was pertinently said by the District Court:

"But it is argued that this presumption or inference is overcome in this case by proof that the "Duc d'Aumale" was inspected before sailing by competent experts and pronounced seaworthy. I do not think such evidence is conclusive. *The inspection was general, largely visual, and not particularly of the parts which proved defective.* The testimony of the experts that they made an inspection and found the ship in good condition is, of

course, persuasive and often satisfactory evidence to show that the vessel was in fact seaworthy at the time she sailed, but it is by no means conclusive.” (Italics ours.)

The circumstances under which the leak developed and afterwards increased, and the condition of hull in rivets and butt seams as disclosed on drydocking demonstrated that she could not have been seaworthy at the inception of her voyage.

Seaworthiness as to Stowage.

In aid of its reliance upon the opinions of the interested witnesses whose depositions were taken in Europe on the matter of stowage of the cargo, appellant quotes a statement of abstract law from *36 Cyc.*, page 251, which cites as its sole authority, *The Musselcrag*, 125 Fed. 786. Indeed, appellant quotes from the decision, and yet it is worthy of note that the Circuit Court of Appeals for the Ninth Circuit expressly overruled the District Court’s finding, which was grounded upon the principle which appellant would now invoke. The Circuit Court of Appeals found that the stowage of the *Musselcrag*’s cargo was not proper, despite the testimony of the interested witness in the foreign loading port. In so doing it accepted the opinions of the disinterested ship masters in the port of San Francisco, corroborated as they were by the circumstances occurring on board ship.

The fact, then, that those who loaded the “*Duc d’Aumale*”, and were thus interested in the controversy, testified that her cargo was properly stowed should not outweigh the opinions of the disinterested sur-

veyors at Buenos Ayres, who formed this conclusion,—that the cargo weights were not properly distributed from their observations of the effects of the strains from the cargo upon the hull in weather ordinarily to be expected, supported as those opinions are by the defects developed in the hull, and by the opinions of equally disinterested opinions of shipmasters and naval architects in San Francisco.

Presumption of Continuing Seaworthiness Inapplicable.

The doctrine of presumption of continuing seaworthiness, as enunciated in *The Edwin I. Morrison*, 153 U. S. 199, and the other cases cited, has no application to the instant case because the latter lacks the condition precedent to the invocation of the principle, namely, the actual seaworthiness of the “Duc d’Aumale” at the commencement of her voyage was not established. The presumption in *The Edwin I. Morrison* was expressly predicated upon the establishment of absolute seaworthiness at the beginning of the voyage. Of course that cannot be invoked in the present case because the evidence shows to the contrary, that the “Duc d’Aumale” was unseaworthy on sailing.

APPELLANT CANNOT INVOKE THE IMMUNITY OF THE THIRD SECTION OF THE HARTER ACT.

Granting that due diligence was exercised to make the “Duc d’Aumale” seaworthy, still appellant cannot invoke the immunity against negligence in management or navigation of the vessel afforded by the third section

of the Harter Act, for the efficient cause of the damage to the cargo was not negligence in management or navigation of the "Duc d'Aumale," but her unseaworthiness.

In its effort to evade liability for its failure to comply with the warranty of seaworthiness implied in the charter party and bills of lading, appellant would thrust upon its 26-year-old master the responsibility for the damage to the cargo which was consummated by the beaching of the "Duc d'Aumale" in Roy Cove, because the youthful master did not return to port for repairs when he discovered his ship making water so as to require 40 minutes' pumping out of every 24 hours to free her. Its whole contention in this regard is that the failure of the master to turn back to port nearly two months prior to the consummation of the loss was the proximate cause of the loss. Despite its verbalistic efforts to thus fix responsibility upon the master, the fact remains that it was the increase in leakage in the unseaworthy hull of the "Duc d'Aumale" caused by the strains of the heavier seas encountered off the Falkland Islands, threatening her safety, which operated as the efficient cause of the beaching and the subsequent damage to the cargo. The proximate cause was the vessel's unseaworthiness,—not the act of the master.

The contention thus adroitly advanced by appellant is said to find support in *Corsar v. J. D. Spreckels & Bros. Co.*, 141 Fed. 260, and an excerpt from the opinion is quoted. But if the further portion of the court's opinion is read, it will be observed that it held that the "Musselcrag" was liable for all of the damages

because of her unseaworthiness at the inception of her voyage.

The lower court had found that part of the damage to cargo had resulted from the neglect of the master to put into Port Stanley for repairs at a time when the "Musselcrag" was but 60 miles distant, and part from perils of the seas. It refused to hold that neglect of the master was within the purview of the third section of the Harter Act, and for that reason held the owner liable for one half of the damages to cargo. On appeal, this court found that the vessel was not seaworthy and reversed the lower court, holding that the cargo owner was entitled to recover for all of the loss and damage sustained. As that included the damage resulting from the negligence of the master, the immunity of the Harter Act was denied the owner. This appears from the following:

"We are, therefore, of opinion that if it be true, as the court below held, that the Musselcrag was in all respects seaworthy for the voyage she undertook at the time of entering upon it, neither the ship nor her owner was responsible for any part of the damage sustained by the cargo by reason of the action of the master in shaping his course for the Cape of Good Hope instead of going to Port Stanley. *But, if the ship in question was not seaworthy for the voyage she undertook at the time of entering upon it, then, clearly, the libellant is entitled to recover for all of the loss and damage sustained.*" (Italics ours.)

The decision is thus an authority for an affirmance of the ruling of the District Court in the present case.

An analogous contention was made in

*Pacific Coast S. S. Co. v. Bancroft-Whitney Co.,
supra.*

wherein it was urged that the proximate cause of the damage to cargo was the stranding of the "Queen of the Pacific" to escape foundering from a leak which developed in fair weather, within twelve hours after leaving the port of San Francisco, and thus "a danger of the seas," and not the unseaworthiness of the vessel. This court exposed the fallacy of the contention in the following language:

"Appellant contends that the stranding of the Queen is the *causa proxima* of the damage, and was a sea peril, within the meaning of the special contracts relieving the Queen from all liability for damage resulting from 'dangers of the sea,' and that upon the established facts 'that a thoroughly seaworthy vessel, without negligence on the part of her crew, springs a leak 12 hours after she sails, she not having, so far as is shown, encountered anything unusual upon the voyage, what is the presumption relating to the leak? Was it the result of accident? Was it the result of a sea peril? That it must be presumed to have resulted from the one or the other, seems evident.' *We are of opinion that the stranding of the ship at Port Harford was only incidental in causing the damage. The steamer was run to the beach, not because of high winds or boisterous weather, or any danger of the sea, but from the fact that a leak had been discovered which could not be controlled. The fact, if it be the fact, that the merchandise was not wet with sea water until the steamer stranded at the beach, is wholly immaterial. It was the leak in the steamer that was the cause of the damage, and the real and only question necessary to be discussed is whether that leak was occasioned by a peril of the sea, or came within any of the excep-*

tions mentioned in the shipping receipt, or, if the cause of the leak is not shown, then, upon the presumptions which the law raises as to the burden of proof; and we shall confine our discussion to those points.” (Italics ours.)

To the same effect was the ruling of the Supreme Court in

The Portsmouth, 9 Wall. 682,

wherein it was said:

“If a jettison of a cargo, or a part of it (and, as matter of course, damage thereto), is rendered necessary by any fault or breach of contract of the master or owners of the vessel, the jettison must be attributed to that fault, or breach of contract, rather than to the sea peril, though that may also be present and enter into the case.”

By the weight of those authorities, escape from liability cannot be had by appellant through the claim of negligence on the part of the master in management and navigation in not returning to port after the leakage of September 29th.

But even if the contention were sound that the loss was caused by negligence in management and navigation, still the protection of the Harter Act could not be invoked because appellant has not affirmatively shown that due diligence was exercised “to make the said vessel * * * properly manned, equipped and supplied.” There is no evidence as to the manning, equipping or supplying of the “Duc d’Aumale” and yet affirmative proof thereof is a condition precedent to the right of immunity under the Act. This was clearly pointed out in *The Wildcroft*, *supra*, whereof the court said:

“To permit a cargo of sugar to be injured by the introduction of fresh water in the manner shown, but for the provisions of this act, would have made a case of clear liability against the owner; and where the statute has given immunity against such loss by reason of error in navigation or management, it does so upon the distinct condition that the owner shall show that the vessel was in all respects seaworthy and properly manned, equipped, and supplied for the voyage, or if this cannot be established, that he has used due diligence to obtain this end. The discharge of this duty is not left to any presumption in the absence of proof. *It is the condition precedent, compliance with which is required of the vessel owner in order to give him the benefit of the immunity afforded by the act.* The reason for requiring this proof by the owner is apparent. He is bound to furnish a seaworthy and properly equipped ship for the purpose of the voyage.” (Italics ours.)

International Navigation Company v. Farr & Bailey Manufacturing Company, 181 U. S. 220; 45 L. Ed. 830.

We respectfully submit that the decrees of the District Court should be affirmed.

Dated, San Francisco,

October 20, 1917.

Respectfully submitted,

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IRA A. CAMPBELL,

MCCUTCHEN, OLNEY & WILLARD,

Proctors for Appellees.

